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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-298

IRVING STOLBERG,

Petitioner

v.

MEMBERS OF THE BOARD OF TRUSTEES FOR THE STATE COLLEGES OF THE STATE OF CONNECTICUT, ET AL,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents hereby oppose petitioner's prayer for a writ of certiorari dated August 27, 1976 and request that it be denied for the reasons set forth below.

QUESTIONS PRESENTED

1. Do the facts and law of the instant case conflict with any decisions in other circuits or with the decision of this Court?

2. Does the petition present any special or important reasons for review by this Court?

STATEMENT OF THE CASE

Respondents deem it necessary to correct certain inaccuracies and omissions in petitioner's statement of the case.

Petitioner contends that the pretrial report and order, filed May 10, 1971, directed the Attorney General to raise the dual job ban issue as a defense in the first case. Petitioner's Brief, pp. 6, 9. This claim is deceiving because based upon a discussion in the pretrial conference the Special Masters merely stated in their pretrial report that the issue could be raised by adding a special defense to the defendant's answer within seven days of the report. Petitioner's Appendix H, p. 55a.

It is significant that the defendants never formally moved to add such a defense, and were not required to do so as a matter of law as it was not necessary for the disposition of the case. As stated in the majority opinion in the Court of Appeals:

> "No such defense was ever interposed. However, at the close of the trial, the plaintiff's attorney, Louis M. Winer, called the attention of the court and the Assistant Attorney General, Sidney D. Giber, to the fact that the defendants had failed to file a defense 'about the question of office holding while on the faculty.' The following colloquy ensued:
>
> COURT: So it's not in the case. A dual job ban might effect the right to tenure?
>
> MR. WINER: It might effect his right to return. Well I withdraw the comment.
>
> COURT: All right — Adjournment.

> "Thus, the record not only reveals that the issue might have been litigated and that it was not, but that counsel for the plaintiff was perfectly well aware of it and did not press the point that it might affect his client's right to return, and that the Court, as its subsequent opinion makes clear, did not consider the issue to be in the case." Petitioner's Appendix A, p. 6a.

As further stated in the majority opinion in the Court of Appeals:

> "Appellant's argument that his natural understanding was that since reinstatement had been ordered there would be no question of his right to salary is belied by his counsel's letter to the Assistant Attorney General on June 26, 1973 which in pertinent part reads:
>
> [W]hat action will your office or the defendants take if Mr. Stolberg maintains his seat in the legislature and accepts reinstatement at Southern Connecticut? *I am sure you recognize that there are questions whether Article 3, Section 11 of the 1965 Constitution covers a teaching position at Southern Connecticut, and we wish to test this in a way that is least costly and risky for Mr. Stolberg.* However this would be no problem if the defendants and your office would take no action upon his return. Have you any precedent or earlier opinions, one way or the other, on the question whether Article 3, Section 11 covers someone teaching at a State College?
>
> "(Emphasis added). The letter is hardly consistent with the present posture of appellant that the prior judgment compelled salary payment despite the dual job ban and in fact indicates a full recognition that further litigation to test the applicability of the dual job ban to Stolberg

would be necessary. In response, the Assistant Attorney General forwarded a copy of the prior adverse opinion of the Attorney General of February 9, 1971 with a covering letter which stated:

> I am sure that you did not intend to ask that the Office of the Attorney General make any commitments, other than on behalf of the defendants. I am confident that you will render your client your usual sound legal advice on any questions he has raised.

"The record and the exchange of correspondence to which we have referred demonstrate that not only the court but also counsel for both parties believed that the Attorney General was not prevented from raising the dual job ban when and if Stolberg returned to SCSC while still a member of the General Assembly. In fact, counsel for Stolberg indicated that the issue would have to be tested. Despite that recognition, the procedural tactic here adopted sought instead to circumvent any determination of the issue on the merits by recourse to a res judicata theory. In our view, the effort was properly thwarted below." Petitioner's Appendix A, pp. 9a, 10a.

In his statement of the case, petitioner also discusses the State's "dual job ban" provisions and concludes that the claimed defenses would not be successful. However, it is clear that in light of the Attorney General's contrary opinion, the dual job ban of the Connecticut Constitution, (Article III, Section 11) and related state statute (Sec. 2-5), presents an unresolved question of state law which should be decided in the state courts, as both the District Court and Court of Appeals pointed out, and which will soon be resolved in the declaratory judgment action of *Stolberg* v. *Niejadlik*, Superior Court, New Haven County, Docket No. 144619. See Respondent's Appendix A; Petitioner's Appendix A, pp. 8a, 9a; Petitioner's Appendix C, p. 25a.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT BETWEEN THIS CASE AND ANY OTHER DECISION IN THE CIRCUITS OR IN THIS COURT.

Petitioner's first reason for granting the petition for a writ of certiorari is that the decisions below are in direct conflict with the decision in *United States* v. *Swift and Co.*, 286 U.S. 106 (1932).

An analysis of the *Swift* opinion and of the decisions below illustrates that the two cases are neither analogous nor in conflict. *United States* v. *Swift and Co.*, dealt with the power of a court of equity to modify an injunction in adaptation to changed conditions, even though the injunction was entered pursuant to a consent decree:

> "There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether anything has happened that will justify us now in changing a decree. The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. Life is never static, and the passing of a decade has brought changes in the grocery business as it has to every other. The inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow. No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in

> saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The above passage from the *Swift* opinion does suggest, as petitioner asserts, that modification of a decree will not be granted lightly and is not a substitute for a direct appeal of an adverse judgment. However, in the present case respondents have not been permitted to undermine or frustrate the terms of the original judgment because the 1972 decree did not preclude the enforcement of the dual job ban by non-party state officials.

At the trial, the District Court indicated to the parties in open court that it did not regard the dual job ban issue as being in the case, and in its memorandum of decision on the motion for contempt judgment, it clarified the judgment to indicate specifically that the judgment did not prejudice the rights of appropriate state officials to assert the state constitutional dual job ban against petitioner. Petitioner's Appendix C, pp. 23a, 24a. The District Court's clarification of the 1972 judgment did not change or undermine the position of the parties bound by that judgment but rather made explicit the obvious — that no decision on the merits of a dual job ban claim had been made and that any complaints about the assertion of this ban should be raised in a separate state court proceeding.

Petitioner also claims that the decisions of the District Court and of the Court of Appeals for the Second Circuit in this case are in conflict with general principles of *res judicata* and their application to the enforcement of judgments containing equitable or injunctive provisions. The decisions below clearly recognize that one of the elements of

the doctrine of *res judicata* is that the bar of the prior judgment extends "not only to all matters pleaded, but to all that might have been. . . ." Petitioner's Appendix A, p. 5a. As stated in the majority opinion of the Court of Appeals, however:

> "In view of Judge Blumenfeld's understanding that the judgment below did not prejudice the Attorney General's present position and the court's subsequent clarification of its own judgment, it is difficult to understand how the general res judicata rubric, which precludes what 'might' have been pleaded, can now be raised when the issue was deliberately eliminated from the case, with the apparent acquiescence of plaintiff's counsel who, although recognizing that the issue might jeopardize his client's return to the faculty, nonetheless withdrew his comment and did not press the point." Petitioner's Appendix A, p. 7a.

The decisions below are thus based on an interpretation of the specific facts of the case, rather than on an erroneous application of general principles of *res judicata*.

B. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW.

It is axiomatic that this court will not grant a petition for writ of certiorari unless there are presented special and important reasons therefor. See Rule 19, Rules of the Supreme Court of the United States. The instant case presents a unique factual situation involving the state's dual job ban prohibitions (Art. III, Sec. 11, Constitution of Connecticut, and Sec. 2-5, Conn. Gen. Stat., as amended; Petitioner's Appendix K, pp. 74a, 75a), which will not likely be presented again, because as stated above, petitioner has commenced an action in the Superior Court of Connecticut seeking a declaratory

judgment and other relief as to his right to compensation under the pertinent Connecticut constitutional and statutory provisions; this state court action should once and for all resolve any doubts as to the meaning and applicability of the dual job ban provisions. See p. 4, *supra*.

Petitioner contends that the results below merit review because of certain problems they raise concerning the Federal Rules of Civil Procedure. It cannot be over-emphasized, however, that the rulings below turn upon the specific facts of the case, which facts indicate that the dual job ban issue was not in the case. In fact, the issue could have been rendered moot either by petitioner's resignation or by his failure to run for re-election or even by defeat in that attempt before he actually decided to return to Southern Connecticut State College.

CONCLUSION

For the aforegoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

COMPLAINT IN CIVIL ACTION OF *STOLBERG V. NIEJADLIK*, NO. 144619, SUPERIOR COURT, NEW HAVEN COUNTY.

1. Southern Connecticut State College ("Southern Connecticut") is one of the four State Colleges established and maintained by the State of Connecticut under the governance, maintenance, and direction, of the Board of Trustees for the State Colleges of the State of Connecticut, as a constituent unit of the System of Higher Education maintained by the State of Connecticut under Section 2 of Article Eighth of the Constitution of the State of Connecticut and under Part Seven of Chapter 164 of the Connecticut General Statutes.

2. Defendants Bernice C. Niejadlik, Peter J. Berry, Lawrence J. Davidson, Patricia A. Geen, Richard Gurney, Ernest A. Johnson, Nancy W. Kaplan, Ramon M. Martinez, Marcus M. McCraven, Margaret Shapiro, Seymour M. Smith, Jr., and Alvin B. Wood, are members of the Board of Trustees for the State Colleges of the State of Connecticut ("Board of Trustees") with such rights, powers, responsibilities, and duties, as are conferred upon them by statute.

3. Defendants Ella T. Grasso, Robert K. Killian, Henry E. Parker, J. Edward Caldwell, and Carl R. Ajello, are the officers of the Executive Department of the state government of the State of Connecticut provided for in Article Fourth of the Constitution of the State of Connecticut.

4. Defendants Joseph J. Fauliso and James J. Kennelly are President Pro Tempore of the Senate of the State of Connecticut, and Speaker of the House of Representatives of the State of Connecticut, respectively, and are the principal officers of the Legislative Department of the state

government of the State of Connecticut provided for in Article Third of the Constitution of the State of Connecticut.

5. Defendants Henry J. Becker, Jr., and Leo V. Donohue, are the Auditors of Public Accounts of the State of Connecticut.

6. Plaintiff was appointed to the faculty of Southern Connecticut State College at the rank of Assistant Professor and to hold such appointment and teach in the Geography Department at Southern Connecticut commencing at the beginning of the academic year 1966-1967.

7. Plaintiff's services were terminated by the President of Southern Connecticut State College and by the Board of Trustees for the State Colleges during the academic year 1967-1968. Upon complaint by plaintiff to the Board of Trustees, such termination was rescinded and plaintiff was reinstated to continue to serve as a faculty member during the academic year 1968-1969.

8. Plaintiff's services were again terminated and plaintiff was dismissed from his faculty position at Southern Connecticut in the spring of 1969.

9. Plaintiff claimed that such termination and dismissal violated and infringed upon plaintiff's rights under the United States Constitution, and plaintiff commenced an action in the United States District Court for the District of Connecticut in 1969. *Stolberg* v. *Buley, et als.*, Civil Action No. 13,591, United States District Court for the District of Connecticut.

10. During the academic years from 1969-1970 through 1973-1974, inclusive, plaintiff served as a member of the faculty and taught geography at Quinnipiac College in Hamden, Connecticut.

11. In 1970, plaintiff ran for and was elected to a seat in the House of Representatives of the General Assembly of the State of Connecticut, representing the 93rd Assembly District. He has been re-elected to that seat in each subsequent election from the same district and has continued to serve as a member of the House of Representatives to date.

12. In February of 1972, the United States District Court, in the action referred to in paragraph 9, above, and after trial, found that the members of the Board of Trustees for the State Colleges in 1969 had impermissibly retaliated against plaintiff for exercising his First Amendment rights under the United States Constitution by refusing to renew his teaching contract at Southern Connecticut for the academic year 1969-1970. The District Court ordered that defendants "promptly offer to reinstate the plaintiff as a faculty member with tenure."

13. Pursuant to the judgment of the District Court, plaintiff returned as of August 28, 1974, to his faculty position at Southern Connecticut, with tenure as provided for under the rules and regulations adopted and promulgated by the Board of Trustees, and plaintiff commenced to serve in that capacity to date and has committed himself under the rules and regulations of the Board of Trustees to teach summer courses during the summer of 1975 and to teach during the academic year 1975-1976.

14. Plaintiff was paid for his services from August 28, 1974, through part of November of 1974.

15. In about October of 1974, defendants Becker and Donohue made the claim that Southern Connecticut was part of the Executive Department of the state government and that plaintiff, by holding a faculty appointment at Southern Connecticut while a member of the General Assembly, was violating Section 11 of Article Third of the Constitution of

the State of Connecticut and Section 2-5 of the General Statutes.

16. Thereafter, and after various correspondence with the Governor, the Attorney General, the Comptroller, the Auditors of Public Accounts, and the Board of Trustees, the Attorney General and the Comptroller acted to cause the suspension, termination, and withholding, of salary payments to plaintiff for his services as a faculty member at Southern Connecticut although plaintiff has continued to teach there and to hold his tenured faculty position at Southern Connecticut as a member of the professional staff.

17. Defendant members of the Board of Trustees have continued to maintain plaintiff's appointment, and have submitted plaintiff's name regularly on duly certified payrolls supporting the payment of plaintiff's teaching salary.

18. Plaintiff has continued to maintain his tenured position and to fulfill his teaching duties accordingly.

19. Plaintiff has received no salary payments for his services as a faculty member at Southern Connecticut since November of 1974. Defendants Caldwell and Ajello and their predecessors have acted to cause, and to continue in effect, the suspension, termination, and withholding, of such salary payments. Defendant Caldwell continues to refuse to make salary payments to plaintiff under Section 3-119 of the General Statutes.

20. Plaintiff claims that Southern Connecticut was established as an independent state institution which does not fall within the departments of the state government established by Article Third, Article Fourth, and Article Fifth, of

the Constitution of the State of Connecticut, for purposes of the above "dual-job ban", and further contends that the State Colleges and their predecessor institutions have long been recognized as independent state institutions existing outside of the political departments of the state and were so maintained and continued by their incorporation into the State System of Higher Education by Public Act No. 33, 1965, and by the provision for and incorporation of such State System of Higher Education, including the State Colleges in the Constitution, not under Articles Third, Fourth, or Fifth, but rather under Section 2 of Article Eighth of the Constitution as adopted in 1965, and under which the Board of Trustees is to maintain independent powers and autonomy and to be free to decide in governing, directing, and maintaining, the State Colleges.

21. Plaintiff further claims that, if Southern Connecticut falls within the Executive Department, the Judicial Department, or the Legislative Department, of the state government of the State of Connecticut, then the provisions of Section 11 of Article Third of the Constitution and Section 2-5, in the circumstances, and upon plaintiff's return to the faculty of Southern Connecticut and continuance therein and after August of 1974, do not and did not affect his status as a faculty member at Southern Connecticut.

22. Plaintiff further claims that, if he is incorrect in either of the claims asserted in paragraphs 21 and 22, above, then the provisions of Section 11 of Article Third of the Constitution and Section 2-5 of the General Statutes, as so interpreted and in the circumstances as applied to him, are overbroad and unduly vague in violation of the Due Process Clause and the Equal Protection Clause of the United States

Constitution and in violation of the related provisions of the Constitution of the State of Connecticut.

23. There are, between and among the parties, actual bona fide and substantial questions and issues in dispute and a substantial uncertainty of legal relations requiring settlement.

The plaintiff claims a declaratory judgment determining:

1. Whether Southern Connecticut State College, and plaintiff's position as a member of the faculty there, falls within the legislative department, the executive department, or the judicial department of the state government, within the meaning of Section 11 of Article Third of the Constitution of the State of Connecticut and Section 2-5 of the General Statutes.

2. Whether, if said State College and said faculty position fall within one of said departments for such purposes, plaintiff continued to hold and continues to hold his appointment as a faculty member with tenured status at Southern Connecticut State College to which he was reinstated as of August 28, 1974.

3. Whether Section 11 of Article Third of the Constitution of the State of Connecticut and Section 2-5 of the General Statutes, as applied to plaintiff in the circumstances, are overbroad and unduly vague in violation of the Due Process Clause and the Equal Protection Clause of the United States Constitution and the related provisions of the Constitution of the State of Connecticut.

Morris Tyler, of Woodbridge, Connecticut, is recognized in the sufficient sum of Two Hundred and Fifty Dollars ($250.00) to prosecute, etc.

Of this writ, with your doings thereon, make due service and return.

Dated at New Haven, Connecticut, this eighteenth day of July, 1975.

/s/ LOUIS M. WINER
Louis M. Winer
Juris No. 68162
Commissioner of the Superior Court

Please enter the appearance of:

TYLER, COOPER, GRANT, BOWERMAN & KEEFE
Juris No. 64830

By /s/ LOUIS M. WINER
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For the plaintiff.